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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. M.B., Defendant and Appellant.	E070267 (Super.Ct.No. FELJS1700138) OPINION

APPEAL from the Superior Court of San Bernardino County. Lorenzo R. Balderrama, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Heather M. Clark, Deputy Attorneys General, for Plaintiff and Respondent.

The Department of Corrections and Rehabilitation certified M.B. as a mentally disordered offender, subject to incarceration in a state hospital. (Pen. Code, § 2966, subd. (a), unlabeled statutory citations refer to this code.) The Board of Prison Terms affirmed the certification. M.B. then petitioned for a civil hearing in the San Bernardino Superior Court, as allowed by section 2966, subdivision (b). At that hearing, the parties agreed the People would submit their case on the written records, as specifically allowed by the statute, and M.B.'s counsel waived any hearsay objections. M.B. then testified, and the trial court found her to be a mentally disordered offender.

On appeal, M.B. argues she should have been personally advised of her due process right to confront the psychologists who concluded she was a mentally disordered offender in written reports. She also objects to her attorney's decision to waive her objections to the expert's reliance on hearsay in the report. We conclude M.B. was not entitled to the procedural protections she invokes. M.B. was not required to forgo cross-examining the psychologists who concluded she is a mentally disordered offender. The statute allows the procedure only upon stipulation of the parties. Her attorney made an informed decision to allow the People to submit their case-in-chief using the written reports instead of live testimony. Requiring the stipulation was sufficient to protect M.B.'s due process rights. Similarly, the trial court did not err by accepting the attorney's waiver of hearsay objections. We therefore affirm the trial court.

I

FACTS

M.B.'s offense involved showing up at the office of a doctor she had known since 1984 when both lived in St. Louis, Missouri. M.B. had harassed the doctor for many years and been convicted of stalking her twice before. This time, she showed up at the doctor's office armed with two knives. She said she believed the doctor was wicked and involved in hurting people and she went to her office "to clear things up" and "to get closure."

On February 1, 2013, a jury convicted M.B. of stalking with a prior conviction for the same offense (§ 646.9, subd. (c)(2)), and two counts of carrying a dirk or dagger (§ 12020, subd. (a)(4)). The trial court sentenced her to 11 years and four months in prison. After applicable credits, M.B. was due to be released from prison on June 6, 2017.

A week before her release date, Dr. Nir Lorant, Chief Psychiatrist for the California Department of Corrections and Rehabilitation, certified M.B. as a mentally disordered offender under section 2966, subdivision (a). Lorant based the certification on the evaluations of two psychologists who submitted written reports. The certification said M.B. qualified as a mentally disordered offender because she had a severe mental disorder, her crime was an offense in which she used or threatened force or violence, her mental disorder was a cause of or an aggravating factor in the offense, she is not in remission and cannot be kept in remission without treatment, she had been in treatment

for the severe mental disorder for 90 days or more in the year before the scheduled parole or release, and she presented a substantial danger of physical harm to others because of her mental condition.

On June 6, 2017, M.B. was paroled and released into the custody of the Department of Mental Health at Patton State Hospital. On August 29, 2017, the Board of Parole Hearings (Board) affirmed the certification was warranted. The Board based its determinations on Dr. Lorant's testimony and the same two psychological evaluations. The Board found M.B. has schizophrenia which was a cause or aggravator of the offense because she "had a history of mental illness, was not taking her psychiatric medications at the time, admitted to having psychiatric symptoms at the time, was described in the probation report as mentally unstable, and was found incompetent to stand trial." They also found she was not in remission, and could not be kept in remission without treatment, "as she had symptoms of an active thought disorder during her certification evaluations, and she had symptoms of paranoid delusions, depression, agitation and anger during the preceding six months," and "[w]ithin the preceding twelve months she had been violent and did not reasonably follow her treatment plan." Finally, they found she had been in treatment for 90 days or more within the last year and she presented a substantial danger of physical harm to others because of her schizophrenia.

On September 21, 2017, M.B. filed a petition for a hearing in the superior court to challenge the certification. (§ 2966, subd. (b).) Before the hearing, the court met with M.B., her attorneys, and the prosecutor. The court discussed with M.B. the differences

between a jury and court trial, and explained she had a right to a jury trial. The court also explained how the trial would work, including opening statements, the presentation of evidence, testimony about psychological and psychiatric issues, cross-examination by the defense to challenge the prosecution's case, and the presentation of defense witnesses. The court explained how it would instruct the jury on the law, explained how juries deliberate, and the requirement that the jury reach a unanimous decision.

Afterward, M.B. personally waived a jury trial and elected a court trial. The court noted the prosecutor intended to submit the case on the records, that M.B.'s attorneys agreed to the procedure, and the defense intended to present M.B.'s testimony. The court did not explain failing to put on live testimony would deprive her of the ability to cross-examine the mental health officials whose reports would be introduced as evidence against her.

At the beginning of the hearing, the prosecution submitted to the court and to M.B.'s counsel a packet of 12 exhibits, representing its case-in-chief. The exhibits contained the Board's Packet (including the Board's Reason for Decision), the Certification of Mentally Disordered Offender by the Chief Psychiatrist, the underlying psychological evaluations, M.B.'s certified RAP sheet, records of her prior convictions, records from her prior criminal cases, a certified transcript from one of her prior cases, her mental health treatment records, and her disciplinary records.

The court asked defense counsel whether the documents should be received into evidence without objection. She responded, "Yes, your Honor. We're waiving any

Sanchez issues," meaning they decided to forgo challenges to the expert testimony under the California Supreme Court's recent decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). The court asked the prosecution whether they wanted to call any witnesses, and they responded, "No, your Honor. We'll submit on that."

M.B. then testified on her own behalf. She said she was presently on parole and housed at Patton State Hospital because she had been adjudicated a mentally disordered offender. She said she had been diagnosed as schizophrenic and took several medications. She said she attended a variety of groups, but had been unable to attend all the groups due to health problems. She also said she had no behavioral problems in her unit.

On cross-examination, M.B. said schizophrenia runs in her family and she believes she has a mental illness. She admitted she wasn't always compliant with orders to take her psychotropic medication when she was at the Chino Institution for Women, and was involuntarily medicated at one point. She said she was told she kicked a staff member in the ribs during a "takedown," though she remembered the event differently and said she thought the kick was inadvertent. M.B. said she had been convicted of stalking the same victim on two prior occasions and had served time in custody for each conviction.

She said her most recent conviction, in August 2009, resulted from her going to the victim's place of employment with two daggers on her person. She claimed, however, that she was there to "clear things up" with the victim and "for closure." She said she met the victim in 1984 in St. Louis, before both moved to southern California.

She also admitted in 1989 she sometimes made over 100 calls to the victim's place of business. She said she believed the victim was "bad news," hurt people, and had something to do with the killing of Tupac Shakur.

On March 21, 2018, the court denied M.B.'s petition. The court found she met the statutory criteria of a mentally disordered offender. It found she has a severe mental disorder, is not in remission, and represents a substantial danger of physical harm to others. The court ordered that M.B. remain committed to the Department of State Hospitals.

On April 2, 2018, M.B. filed a timely notice of appeal.

II

ANALYSIS

M.B. argues the trial court erred by permitting her attorney to agree the People could present their case-in-chief on the submitted records, including the psychological reports, and by permitting her to waive any objections under *Sanchez*, *supra*, 63 Cal.4th 665. She says her waiver could be accepted only if she had been advised of her due process confrontation rights.

The Mentally Disordered Offender Act (MDO Act) requires offenders who have been convicted of specified felonies, committed due to or aggravated by severe mental disorders, and who continue to pose a danger to society, receive appropriate treatment until the disorder can be kept in remission. (*People v. Harrison* (2013) 57 Cal.4th 1211, 1218.) "The MDO Act is not penal or punitive, but is instead designed to 'protect the

public' from offenders with severe mental illness and 'provide mental health treatment until the severe mental disorder which was one of the causes of or was an aggravating factor in the person's prior criminal behavior is in remission and can be kept in remission.'" (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061, quoting § 2960.)

"An initial MDO commitment occurs as a condition of parole and is governed by section 2962. The initial MDO commitment is triggered by a certification by a chief psychiatrist of the Department of Corrections and Rehabilitation that the prisoner has a severe mental disorder, that the disorder is not in remission or cannot be kept in remission without treatment, that the disorder was a cause of or an aggravating factor in an enumerated crime for which the prisoner was sentenced to prison, that the prisoner has been in treatment for the disorder for 90 days or more in the year preceding release on parole, and that the prisoner represents a substantial danger of physical harm to others because of the disorder. (§ 2962, subd. (d)(1).)" (*Harrison*, *supra*, 57 Cal.4th at p. 1218.) Commitment is not indefinite. "An MDO is committed for . . . one-year period[s] and thereafter has the right to be released unless the People prove beyond a reasonable doubt that he or she should be recommitted for another year."[1] (*Lopez v. Superior Court*, *supra*, 50 Cal.4th at p. 1063.)

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[1] We grant M.B.'s motion to take judicial notice of the Board's decision to keep her in custody as a mentally disordered offender. Though it's been more than a year since M.B.'s initial commitment, we exercise our discretion to consider her appeal because the problem she identifies is a matter of public interest which may recur yet evade review. (*Gordon v. Justice Court* (1974) 12 Cal.3d 323, 326, fn.1.)

The MDO Act has specific provisions governing challenges to an MDO certification. "Any prisoner who is to be required to accept treatment [under] Section 2962 shall be informed in writing of his or her right to request a hearing." (§ 2964, subd. (a).) A prisoner who disagrees with the MDO certification decision may request a hearing before the Board to challenge it. (*Harrison*, *supra*, 57 Cal.4th at p. 1218.) If the prisoner disagrees with the Board's determination, they may file a petition for a hearing in the superior court on whether they "as of the date of the Board . . . hearing, met the criteria of Section 2962." (§ 2966, subd. (b).) At the superior court hearing, the People must establish the criteria of section 2962 beyond a reasonable doubt. (*Harrison*, at p. 1219.)

The MDO Act specifically allows the procedure, employed here, of submitting psychological evaluations of the petitioner in written form. "The court may, upon stipulation of both parties, receive in evidence the affidavit or declaration of any psychiatrist, psychologist, or other professional person who was involved in the certification and hearing process, or any professional person involved in the evaluation or treatment of the petitioner during the certification process. The court may allow the affidavit or declaration to be read and the contents thereof considered in the rendering of a decision or verdict in any proceeding held pursuant to subdivision (b) or (c)." (§ 2966, subd. (b).)

The statutory procedure does not require the court to advise and obtain a waiver of the right to confront witnesses before accepting a stipulation to submit psychological

evaluations in written form. This omission stands in contrast to the statute's explicit requirement that the court "shall advise the petitioner of his or her right to be represented by an attorney and of the right to a jury trial." (§ 2966, subd. (b).) It follows that M.B.'s complaint is not that the trial court violated the statute by accepting the stipulation without advising M.B. she was giving up her right to confront these witnesses and obtaining a waiver, but that the procedure set out in the statute is inadequate to protect her rights.

M.B. rightly identifies the due process clause of the Fourteenth Amendment as the source of her rights. "An MDO proceeding is civil, rather than criminal, in nature. [Citation.] It does not implicate all of the constitutional and procedural safeguards afforded to criminal defendants." (*People v. Fisher* (2009) 172 Cal.App.4th 1006, 1013.) Nevertheless, "states must ensure due process protections and safeguard liberty interests when a person is civilly committed. [Citations.] '[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. [Citations.] Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.'" (*People v. Allen* (2007) 42 Cal.4th 91, 98.) Nevertheless, the Supreme Court "has 'consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper

procedures and evidentiary standards. [Citations.] It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty.'" (*Ibid*.)

The question we must answer, then, is whether due process requires courts to advise defendants they would be giving up their right to confront witnesses against them—including psychologists who submit written reports—and obtain a knowing waiver of that right before following the statutory procedure. Our answer is no. The statute adequately protects defendants' due process rights by allowing the submission of written records as evidence *only if* both parties stipulate to that procedure. In other words, a defendant facing an MDO determination will lose the ability to cross-examine witnesses only if they affirmatively relinquish it. M.B. asks that we hold the defendant can waive such rights only by *personal* waiver. However, the Legislature concluded attorneys could protect their clients by making informed judgments about when to require and when not to require live testimony of psychologists and psychiatrists who made adverse determinations of their clients' mental condition. We see no reason to question the Legislature's judgment.

People v. Otis (1999) 70 Cal.App.4th 1174 is instructive. Otis's attorney waived a jury trial over defendant's in-court objection, and the trial court accepted the waiver. On appeal, Otis argued the waiver had to be personal to be effective, even in a civil proceeding like an MDO hearing. (*Id.* at p. 1176.) The Court of Appeal disagreed. "Section 2966 concerns persons who have been found by the Board of Prison Terms to be

mentally disordered. The Legislature must have contemplated that many persons, such as Otis, might not be sufficiently competent to determine their own best interests. There is no reason to believe the Legislature intended to leave the decision on whether trial should be before the court or a jury in the hands of such a person." (*Id.* at p. 1177.)

We conclude the same considerations underwrite the Legislature's decision to allow counsel to waive the due process right to confront witnesses. In civil proceedings, """[d]ue process requires only that the procedure adopted comport with fundamental principles of fairness and decency. The due process clause of the Fourteenth Amendment does not guarantee to the citizen of a state any particular form or method of procedure."""" (*People v. Nelson* (2012) 209 Cal.App.4th 698, 712.) We are confident the Legislature has established an adequate procedure here. Counsel for MDO defendants have a professional responsibility to carefully consider whether, in any particular case, it would be fruitful to cross-examine a psychologist or psychiatrist whose report supports continued involuntary commitment under the MDO Act. If cross-examination may bear fruit, the attorney should not stipulate to submission of affidavits or declarations. Requiring MDO attorneys to exercise their sound judgment is an adequate protection for petitioners challenging their designation as mentally disordered offenders.[2]

[2] M.B. argues leaving such waiver decisions in the hands of attorneys will not protect defendants from poor decisions by their attorneys. However, it's possible to challenge such decisions under the doctrine of ineffective assistance of counsel. (See *People v. Bona* (2017) 15 Cal.App.5th 511, 521-522 [holding counsel had legitimate tactical reason for waiving *Sanchez* objections in an MDO proceeding].)

We also reject M.B.'s challenge to her attorney's waiver of objections under *Sanchez*. In *Sanchez*, the Supreme Court held "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) Accordingly, the statements must either be independently proven or fall under a hearsay exception in order to be admissible. (*Ibid*.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried."[3] (*Id*. at p. 676.)

Though the psychologists' reports in this case contained hearsay statements, M.B.'s attorney affirmatively waived any objections on that basis. Parties may, in general, waive objections to hearsay, either affirmatively or by failing to object in the trial court. (*People v. Wheeler* (1992) 4 Cal.4th 284, 299.) Indeed, some courts have held parties waived objections to expert reliance on fact-specific hearsay even before the Supreme Court issued the *Sanchez* opinion. (*People v. Blessett* (2018) 22 Cal.App.5th

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3 When a prosecution expert in a criminal case seeks to relate testimonial hearsay, as contemplated in *Crawford v. Washington* (2004) 541 U.S. 36, there is a confrontation clause violation unless (1) the declarant is unavailable, or (2) the defendant either "had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) M.B. acknowledges *Sanchez* does not apply to the extent it addresses a criminal defendant's rights under the state and federal confrontation clauses because those rights are not implicated in MDO proceedings. (*People v. Otto* (2001) 26 Cal.4th 200, 214; *People v. Nelson*, *supra*, 209 Cal.App.4th at p. 712.)

903, 929-930.) We see no basis for holding the trial court erred by accepting an affirmative waiver of such objections.

M.B. asks us to reach back to a case decided under the defunct Mentally Disordered Sex Offenders Act, which held the People could not submit doctors' reports to support civil commitment unless the defendant had stipulated to the submission after being advised of their rights and personally waiving them. (*People v. Colvin* (1981) 114 Cal.App.3d 614, 629-630 (*Colvin*).) She asks us to impose the same conditions on the submission of reports under the MDO Act as a matter of due process.

Colvin is inapposite. The case involved a claim that the court had violated defendants *statutory* rights by failing to inform him—orally and before a hearing on the issue—that he was alleged to be a mentally disordered sex offender and that he had the right to contest that allegation. Specifically, former Welfare and Institutions Code section 6305 directed "'[t]he person certified or alleged to be a mentally disordered sex offender shall be *taken before* a judge of the superior court of the county. The judge shall *then inform him* that he is certified or alleged to be a mentally disordered sex offender, *and inform him of his rights to make a reply and to produce witnesses in relation thereto*." (*Colvin*, *supra*, 114 Cal.App.3d at pp. 629-630, quoting former Welf. & Inst. Code, § 6305.) The Court of Appeal held the trial court violated these statutory rights by providing only *written* notice of the allegation (in small print yet) and informing him of his rights to reply and present his own witnesses only at the hearing on his status. (*Colvin*, at pp. 629, 631-632.) The holding concerned only defendant's *statutory* rights,

not his constitutional rights. As M.B. concedes, Welfare and Institutions Code section 6305 has been repealed, and the MDO Act does not contain the same procedural protections. (*In re Huffman* (1986) 42 Cal.3d 552, 555 ["The MDSO statutes . . . were repealed in 1981 and replaced prospectively by a new treatment-confinement scheme for certain persons convicted of sex crimes"].) We don't think it's necessary to read those statutory protections into the MDO Act as a matter of due process.

III

DISPOSITION

We affirm the MDO commitment order.

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SLOUGH
J.

We concur:

MILLER
Acting P. J.

CODRINGTON
J.